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# CPLR 3019(c): Setoff Counterclaim on Assigned Claim

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This case highlights the problem of whether a practitioner can determine the statutory cause of his dismissal if the court is not explicit. Neither *Houle* nor *Flannery* comes to grips with this problem. Both illustrate the need for some judicial determination so that the practitioner can judge how long a delay will change a 3012 dismissal into a 3216 dismissal, and thereby cause a plaintiff to lose the six-month extension granted by CPLR 205.[171]

*CPLR 3019(c): Setoff counterclaim on assigned claim.*

Until 1936 the Civil Practice Act divided counterclaims into two categories: the setoff and the recoupment.[172] The setoff could be asserted by an obligor against a plaintiff if the claim matured before assignment, and if defendant had knowledge of the claim prior to notice of the assignment. On the other hand, a recoupment counterclaim could be asserted although maturing after assignment.[173]

After 1936 there was some doubt as to whether an amendment to the section eliminated this division. CPLR 3019(c) retained this confusion. All doubt was ended in 1964 by the court of appeals which, in the case of *James Talcott, Inc. v. Winco Sales Corp.*,[174] confirmed the recoupment-setoff distinction.

In the recent appellate division case of *Chatham Sec. Corp. v. J.R. Williston & Beane*,[175] defendant asserted a claim against the plaintiff arising out of a separate transaction with plaintiff's principal-assignor. That case was resolved on principles of agency. The court held that "it is well-established law that an agent who acquires an interest in his principal's contract takes subject to defenses available against this principal even as any assignee. . . ." [176] With the case so resolved, the court chose to discuss plaintiff's contention that it was an assignee.[177] The court indicated that the counterclaim was a setoff since it arose from a transaction other than the one sued upon by the plaintiff.

Since the court acknowledged that the counterclaim was a setoff, the dictates of *Talcott* demanded that it could only be raised against the plaintiff if it existed *prior to the assignment,* and if

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[171] For an excellent illustration of the lack of clarity that marks this area see Simmons v. New York City Transit Authority (Sup. Ct. Kings County) 153 N.Y.L.J., March 5, 1965, p. 18, col. 2.

[172] CPA § 266 as amended.

[173] CPA § 267 as amended.

[174] 14 N.Y.2d 227, 199 N.E.2d 499, 250 N.Y.S.2d 416 (1964). This case is analyzed in *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 181, 182-83 (1964).

[175] 22 App. Div. 2d 260, 254 N.Y.S.2d 436 (1st Dep't 1964).

[176] *Id.* at 265, 254 N.Y.S.2d at 440.

[177] After indicating that Chatham was liable for the setoff, the court introduced its conclusion as to plaintiff's rights as an assignee: "If Chatham is treated as an assignee of Arlee, its position is worsened." *Ibid.*

defendant had notice of the setoff prior to notice of the assignment. Whether it had in fact existed prior to the assignment was not examined by the court.[178] Rather, the court indicated, somewhat inaccurately, that,

> an assignee is subject to *setoffs* available against the assignor whenever the *setoffs* are based on facts existing *prior to knowledge* by the obligor of the assignment. . . .[179]

The court failed to cite *Talcott* and, in addition, indicated that its statement was inconsistent with CPLR 3019(c) [180] and with several prior decisions.[181]

Although the decision would not have been altered by a proper pronouncement of the court, such inaccuracy must be indicated. Imprecise dicta can only serve to confuse practitioners as to the exact nature of the setoff counterclaim.

*Reply allowed to state what appears to be a counterclaim.*

A reply is the pleading, designated by CPLR 3011, to be served in response to a counterclaim. A reply may also be required, in other circumstances,[182] by court order.[183] It has been firmly established that only defenses and denials may be pleaded in a reply regardless of why the reply was served.[184]

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[178] "The Court need not decide, and the record does not establish, whether the bonds [from which transaction the setoff arose] were delivered to Arlee before or after receipt of the securities from, and delivery of the check to, Meadow Brook on May 26, although both events took place on the same day. The important fact is that it was not until after delivery of bonds . . . that it was revealed to the broker [defendant] that Chatham [plaintiff] . . . had obtained an interest in its principal's securities." *Ibid.*

[179] *Ibid.* (Emphasis added.)

[180] *Ibid.*

[181] Fera v. Wickham, 135 N.Y. 223, 31 N.E. 1028 (1892); Michigan Sav. Bank v. Millar, 110 App. Div. 670, 96 N.Y. Supp. 568 (1st Dep't), *aff'd*, 186 N.Y. 606, 79 N.E. 1111 (1906).

[182] An affirmative defense may be one such circumstance. *E.g.*, Palmer v. Anderson, 243 App. Div. 618, 276 N.Y. Supp. 478 (2d Dep't 1935).

[183] CPLR 3011. See, *e.g.*, Mercantile Nat'l Bank v. Corn Exch. Bank, 73 Hun 78, 25 N.Y. Supp. 1068 (Sup. Ct. 1893).

[184] Although the provisions of the procedure statutes have not explicitly restricted the inclusion of counterclaims in a reply, courts have never been hesitant to infer this restriction. The restriction was present under the Code of Civil Procedure § 514 as illustrated in Cohn v. Husson, 66 How. Pr. 150 (N.Y. City Ct. 1883). In Seligmann v. Mandel, 19 Misc. 2d 418, 190 N.Y.S.2d 388 (Sup. Ct. 1959), the court held that under CPA § 272, counterclaims were not includible in a reply. The provisions of CPA § 272 are now embodied in Sections 3011, 3014 and 3018(a) of the CPLR. This division has not changed the policy of excluding counterclaims. See, *e.g.*, Habiby v. Habiby, — App. Div. 2d —, 256 N.Y.S.2d 634 (1st Dep't 1965); *In re* Cohen (Sup. Ct. N.Y. County) 150 N.Y.L.J., Nov. 25, 1963, p. 12, col. 4.